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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

13 CR 30 (JSR)

5 EDGAR ENCARNACION-LAFONTAINE,

6 Defendant.

7 -----x

8 New York, N.Y.

April 3, 2015

9 3:05 p.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA,

16 United States Attorney for the  
Southern District of New York

17 EMIL J. BOVE III

Assistant United States Attorney

18 NATALI TODD

19 KAREN CHARRINGTON

Attorneys for Defendant

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1 (Case called)

2 THE COURT: Will the parties please identify  
3 themselves for the record.

4 MR. BOVE: Good afternoon, your Honor. Emil Bove, for  
5 the government.

6 THE COURT: Good afternoon.

7 MS. TODD: Good afternoon, your Honor. Natali Todd,  
8 for Mr. Encarnacion, and also present with me is  
9 Ms. Charrington and Mr. Encarnacion.

10 THE COURT: Good afternoon.

11 We are here for sentence. Let me find out first: Are  
12 there any objections to the presentence report other than the  
13 numerous objections set forth in the parties' written  
14 submissions?

15 MR. BOVE: Not from the government, your Honor.

16 MS. TODD: Nothing additional, your Honor.

17 THE COURT: Okay.

18 So let's deal with those objections. Most of them  
19 relate to the calculation under the guidelines, which of course  
20 the Court must take into account but it's not bound by in terms  
21 of the ultimate sentence.

22 The probation office calculates the offense level at  
23 41, Criminal History Category of I, and a guideline range there  
24 of 324 to 405 months. The defense counsel calculates the  
25 offense level of 31, a criminal history category, everyone

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1 agrees, of I, and a guideline range of 108 to 135 months. The  
2 government agrees with the probation calculation.

3 I'm in between, as follows:

4 First, with respect to the quantity of marijuana, the  
5 jury convicted Encarnacion of conspiring to distribute 100  
6 kilograms or more, and while both probation and the government  
7 contend that at least a thousand kilograms of marijuana was  
8 involved, I think this greatly exaggerates what Encarnacion  
9 himself knew or reasonably foresaw was the scope of the  
10 conspiracy in terms of the weight of the drugs. So I  
11 calculated that, for sentencing purposes, as 100 kilograms.

12 Second, with respect to the cocaine quantity, there we  
13 had testimony -- not testimony but a confession earlier on from  
14 Encarnacion that one of the boxes that he confessed to having  
15 transported had 20 kilograms of cocaine. There was testimony  
16 that there were five boxes and that he saw at least three  
17 boxes, or at least Goris testified that he saw the three boxes  
18 of cocaine, and that Goris testified that he tallied the  
19 cocaine from, what he saw, as 70 packages, each containing one  
20 kilogram, and I accept that. And so I calculate the cocaine  
21 quantity as 70 kilograms.

22 The defense argues, while we're on the subject of  
23 this, because it relates also to mandatory minimums, that the  
24 defendant qualified for safety-valve eligibility. I think it's  
25 patently evident that Mr. Encarnacion did not truthfully

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1 provide all information necessary to qualify for the safety  
2 valve, and so that application is denied.

3 With respect to enhancements, on the drug conspiracy  
4 group, with respect to the two-level enhancement for use of a  
5 threat, I think that that was implicit in statements that  
6 Encarnacion left in his voicemail with Goris, which Encarnacion  
7 said that he was not alone, that that he was going to find  
8 Goris and make him pay or make the family pay if Goris didn't  
9 come. This is all within the context of the statements made on  
10 the very night that Goris stole the money and therefore was  
11 part of the drug conspiracy. So I will award that enhancement.

12 With respect to the two-level enhancement for  
13 obstruction of justice in the drug conspiracy, I never give  
14 that enhancement for testimony given on the stand, not because  
15 I thought Mr. Encarnacion was truthful on the stand -- I found  
16 his testimony untruthful -- but because, as a policy matter, I  
17 believe that the obstruction for giving false statements in  
18 testimony is seriously flawed in that it considerably chills  
19 people from taking the stand and, thus, while in this case the  
20 defendant was guilty, there are many innocent people who will  
21 be deterred from taking the stand because they are being told  
22 in advance by their lawyers that if the jury or the judge finds  
23 them untruthful, they will suffer a further enhancement for  
24 obstruction of justice. So as a policy matter, I do not award  
25 that enhancement. I have set out my reasoning for this in

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1 greater length in written opinions that I have issued in other  
2 cases. So that will not be granted.

3 With respect to the three-level enhancement for  
4 committing an offense while on pretrial release, that is  
5 clearly warranted, and so that will be granted.

6 Turning to the other grouping for threats, the  
7 two-level enhancement for use of a threat is clearly called for  
8 there.

9 The one-level enhancement for quantity of funds  
10 demanded, Encarnacion says that he did not know the actual  
11 amount. And I think that the inferences that the government  
12 argues that he did are not sufficient, so I will not award that  
13 enhancement.

14 Again, with respect to the adjustment for obstruction  
15 of justice under the threats grouping, for the same reasons  
16 that I did not award it in the drug grouping, I don't award it  
17 in the threats grouping.

18 Finally, with respect to the three-level enhancement  
19 for committing an offense while on pretrial release, that  
20 clearly was called for and it will be granted.

21 So the result of all this is that when you take all  
22 those calculations and you take the grouping rules, you wind up  
23 with an offense level of 39 and, of course, a Criminal History  
24 Category of I, and a guideline range of 262 to 327 months.

25 Now, having said all that, no one who is familiar with

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1 this Court will be surprised to hear that that is just a modest  
2 factor in how this Court will arrive at sentencing, given the  
3 Court's views of the sentencing guidelines in general and how  
4 they're arrived at, which this case and all these Mickey Mouse  
5 calculations well illustrates.

6 So, unless anyone has anything further they want to  
7 say on the calculation, let's turn to the real issue, which is  
8 what the sentence should be under Section 3553(a). And on  
9 that, I'll hear first from defense counsel, then from  
10 government counsel, and then from the defendant if he wishes to  
11 be heard.

12 MS. TODD: Thank you, your Honor.

13 The Court's resolution with respect to the objections  
14 to the presentence report has essentially shortened my argument  
15 tremendously. In saying that, I will rely primarily on my  
16 written submissions to the Court --

17 THE COURT: Yes, all your issues are preserved for  
18 appeal.

19 MS. TODD: Thank you.

20 But I will ask the Court, in sentencing  
21 Mr. Encarnacion, to be reasonable in what the Court decides is  
22 the appropriate sentence for him and to consider his personal  
23 history and characteristics and be mindful of the principles of  
24 fairness and proportionality.

25 Mr. Encarnacion is 47 years old. He's been in this

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1 country for 37 years. Most of that time --

2 THE COURT: Let me take the liberty of interrupting.  
3 And in this, what I am about to say, is something the  
4 government may want to respond to as well when they get to  
5 their portion of the colloquy.

6 Mr. Encarnacion previously entered a plea under which  
7 the guideline calculation would have been 151 to 188, I  
8 believe, or 180-something. And of course he might have gotten  
9 lower than that, that was just a guideline calculation, but he  
10 had every reason to believe, having negotiated that with the  
11 government, that that was something that he believed was, or  
12 his counsel believed was, a fair resolution, assuming arguendo  
13 that he was guilty of the crimes.

14 Now, he asserted he was not guilty of the crimes; and  
15 therefore I allowed him to withdraw his plea and go to trial.  
16 But he has now been found guilty of those crimes. And the  
17 probation office here, I think, in recognition of that, as well  
18 as all the other factors under Section 3553(a), which I must  
19 and do consider, recommended a sentence within that range, 151  
20 months.

21 Now, I'm not sure it should be that low but I  
22 certainly don't see why it should be lower than that. That  
23 surely took account of a lot of the things you're arguing for  
24 now. Given the potential of a much, much greater guideline  
25 calculation, it was a fairly reasonable resolution that

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1 undoubtedly took account of the fact that he had no criminal  
2 history -- I also take account of that, I think that's  
3 important -- it took account of the fact that he had worked  
4 hard in various legitimate jobs, took account of his age, it  
5 took account of his family circumstances, all things that I  
6 also take account of and weigh in his favor.

7 But why would I want to go lower than 151?

8 MS. TODD: Well, your Honor, I don't think at the time  
9 that the plea agreement, prior plea agreement, was drafted, the  
10 government was fully aware of Mr. Encarnacion's history in  
11 terms --

12 THE COURT: What is it you think they didn't know  
13 about?

14 MS. TODD: Well, when you negotiate a plea, part of  
15 the consideration is that you are saving the government a  
16 tremendous amount of expense from going to trial, that's one  
17 consideration, and allowing a speedy resolution --

18 THE COURT: On that, of course, I should impose a  
19 higher penalty, right?

20 MS. TODD: No, because then that would be penalizing  
21 Mr. Encarnacion for exercising his constitutional right to go  
22 to trial.

23 THE COURT: It won't be penalizing him. It would be  
24 saying he's no longer entitled to the credit that he otherwise  
25 receives for saving the government all that time and effort,



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1 which is right there in the guidelines, as you know. It's not  
2 regarded as a penalty under the law.

3 MS. TODD: Well, your Honor, I don't think that would  
4 be a fair assessment because ultimately he has to be punished  
5 for his role in the offense and the actual crime. And in doing  
6 so, a number of factors, some of which the Court has just  
7 listed, should be considered. We are talking about a  
8 47-year-old man who within the hierarchy of the conspiracy --

9 THE COURT: Just so we're clear, you know we are not  
10 bound in any way, shape or form by the prior plea agreement.  
11 It has been vacated and he went to trial, as was his right, and  
12 I was very happy to accord him that right. But just looking at  
13 it realistically, didn't that reflect, among other things, all  
14 the factors that you're now bringing to my attention?

15 MS. TODD: I don't think so, your Honor, because the  
16 guidelines are calculated based on numbers, in terms of  
17 enhancements, the amount of narcotics involved, a certain  
18 number of points are awarded for certain categories and --

19 THE COURT: Yes, of course on that, we have the  
20 calculation that we now have --

21 MS. TODD: Right.

22 THE COURT: -- that is 262 to 327 months. And the  
23 government would argue that, and the probation office argue,  
24 that it should have been even higher.

25 MS. TODD: I'm saying that the guideline calculation

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1 in and of itself, even though it's a starting point, it's not  
2 per se reasonable.

3 THE COURT: I totally agree with that, I totally agree  
4 with that.

5 But now, for example, I do find, though I did not as a  
6 policy matter give an enhancement for this in terms of  
7 guideline calculation, but I do find he lied blatantly on the  
8 stand. Should I disregard that totally?

9 MS. TODD: I don't think -- no, your Honor, the Court  
10 should not disregard, the Court should consider all factors  
11 relevant to sentencing, and it's simply a matter ultimately  
12 what the Court considers to be fair and reasonable with respect  
13 to this individual in terms of the punishment that is  
14 sufficient for his crimes, in that it shouldn't be greater than  
15 necessary to punish him.

16 THE COURT: I agree.

17 MS. TODD: It shouldn't take away all hope of  
18 possibility.

19 THE COURT: I guess the point is this -- and let's  
20 forget about the false testimony altogether because, for the  
21 reasons I've already indicated, I think as a policy matter it's  
22 not a good idea to punish somebody for that. I just want the  
23 record to reflect that I wasn't blind to what I thought was his  
24 perjurious testimony. But I now know infinitely more about the  
25 facts of this case than I did at the time that we had the

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1 pretrial proceedings. And a great deal of what I know is not  
2 very favorable to your client. So, in ignorance of all that, I  
3 might have been more sympathetic to some of the arguments  
4 you're now making but of course now I know all that.

5 Well, I'll come back to you, Ms. Todd, in just a  
6 minute. Let me hear from the government because the question I  
7 have for the government is this: The government had full  
8 knowledge of this case before it went to trial. The government  
9 clearly, by entering into a plea bargain that contemplated 151  
10 to 180 or so months, which the government always supports the  
11 guidelines being their bible, the government clearly thought  
12 that that was sufficient to fulfill all the requirements of  
13 Section 3553(a), or they would not, in dereliction of their  
14 duty to see that justice is done, have entered into that plea.

15 So how can I give a higher sentence than that, when  
16 the government in effect told me, through their actions during  
17 the plea bargain, that that was sufficient?

18 MR. BOVE: Judge, the plea bargain in this case, we  
19 acknowledge that happened right on the eve of trial, of course.  
20 At the same time, the plea offer that was extended contemplated  
21 a number of considerations that we've raised at other times in  
22 these proceedings that were very important to us. And they  
23 relate to litigation risk and they relate to the human costs of  
24 calling as witnesses some of the lay witnesses who the  
25 defendant has now been convicted of conveying threats to. It

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1 allowed the government, that plea offer allowed the  
2 government --

3 THE COURT: But surely that might be why you would not  
4 want the highest sentence that you might otherwise be able to  
5 achieve, but surely you would never, would you, enter into an  
6 agreement that allowed the defendant to receive a sentence that  
7 did not carry out the functions of Section 3553(a), would you?

8 MR. BOVE: I can't disagree with that statement. But  
9 I would also say that another reason I think the guidelines are  
10 different today than they were when we made that plea offer  
11 before the trial is that there were then a number of  
12 proceedings after that, and a lot of time elapsed and the  
13 investigation continued. So if we're focused on 3553(a), there  
14 are, we believe, additional aggravating factors that were  
15 identified post that plea and post even the withdrawal of that  
16 plea that bear on sentencing today. Some of them came up  
17 during the trial.

18 For instance, when Ms. Gomez from the DR testified  
19 about the phone call she received and the threat that there  
20 will be blood, I think it's fair at this point, at sentencing,  
21 your Honor will recall that there were some evidentiary  
22 objections to Facebook items that showed both unexplained  
23 wealth that appeared to be linked to the defendant in the  
24 Dominican Republic as well as associates that the defendant  
25 admitted during his testimony were his, possessing firearms,

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1 all things that made his conduct in context, from our  
2 perspective, more serious.

3 I think we are at the point in the proceeding where  
4 we're talking about 3553(a), and I do think that there were  
5 some factors, even setting aside the human cost, the very real  
6 cost of having those lay witnesses come in to testify twice  
7 since then, that are aggravating and do warrant punishment at  
8 least where your Honor has calculated the guidelines here  
9 today.

10 THE COURT: All right. Let's go back to Ms. Todd.

11 MS. TODD: Just with respect to the last statements  
12 that Mr. Bove referred to regarding unexplained wealth: I know  
13 the government does not have any proof that the property that  
14 they referred to belonged to Mr. Encarnacion. That was his  
15 father's property. And I actually have the deed, which  
16 predated from 19 --

17 THE COURT: That doesn't play any role in my  
18 calculation.

19 MS. TODD: Right.

20 THE COURT: What does play a role with the Court is  
21 the very point that the prosecutor just made, which I do think  
22 was brought home vividly to the Court, which was the way  
23 Mr. Encarnacion terrorized people like Ms. Gomez in furtherance  
24 of his threat conspiracy. That's very difficult to swallow.

25 MS. TODD: Just a moment, your Honor?

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1 THE COURT: Yes.

2 (Pause)

3 MS. TODD: Your Honor, my recollection of that  
4 particular phone call was no phone number, no voice  
5 recognition, and I understand it's circumstantial but that is,  
6 I think, a stretch to attribute that --

7 THE COURT: It's part, and I'm not just relying on  
8 just that, although I don't regard it as a stretch at all, but  
9 I think there was plenty of evidence, as the jury in effect  
10 found, that Mr. Encarnacion --

11 MS. TODD: The question --

12 THE COURT: -- is not above making implicit physical  
13 threats, not just to people he's trying to get money back from,  
14 both to their family and to others, an entirely despicable  
15 conduct on his part.

16 MS. TODD: May I, your Honor?

17 THE COURT: Of course.

18 MS. TODD: The question to the government was, or at  
19 least my interpretation is, what did they not know at the time  
20 of the plea that they learned later. The government's position  
21 from day one was that Mr. Encarnacion made the threats, was  
22 responsible for the Facebook threats. We have all of the  
23 documentation with respect to the specific language that was  
24 used in those Facebook communication. They had all of the  
25 phone calls, they had spoken with respect to the marijuana

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1 conspiracy, they had been speaking with and meeting with the  
2 Herrera brothers for a substantial amount of time and knew the  
3 scope of the conspiracy.

4 So I'm not sure that there was any additional  
5 information in terms of the plea that was offered then that was  
6 different than came out at trial. They were aware of all of  
7 that information and, with that information, determined that  
8 the plea that they offered was sufficient.

9 THE COURT: Okay. Anything else that you wanted to  
10 add?

11 MS. TODD: Judge, I'll rely on my submission. I'll  
12 just ask the Court to be very reasonable. I think, at the very  
13 least, the mandatory minimum of ten years is a substantial  
14 sentence for this 47-year-old man, who has never had any prior  
15 contact with the criminal justice system. He will be deported.  
16 He has lost everything he has worked for, having been in this  
17 country for over 37 years, and he will be starting from the  
18 ground up at whatever age that is past middle age, at whatever  
19 sentence the Court decides, even with a mandatory minimum  
20 sentence. So I'm asking the Court to be very reasonable and  
21 consider that Mr. Encarnacion was not a leader, a manager, and  
22 he was not running the operation.

23 Thank you.

24 THE COURT: Thank you.

25 Let me hear from Mr. Encarnacion if he wishes to be



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1 heard.

2 (Pause)

3 THE COURT: I see him shaking his head, no so I take  
4 it he doesn't wish to be heard.

5 MS. TODD: He does not wish to. He relies on his  
6 letter to you.

7 THE COURT: All right.

8 This sentence presents -- it presented for the  
9 probation office and it presents to this Court -- some  
10 interesting policy issues. No matter how you look at what  
11 Mr. Encarnacion did, you cannot help but recognize that the  
12 guideline calculations are absurdly high. Under the probation  
13 office calculation, which the government agreed with, the  
14 calculation was 324 to 405 months -- in other words, 30 years  
15 or so -- for a gentleman who was, under any circumstance, a  
16 relatively modest participant in these conspiracies.

17 Even under my calculations, the guideline range is 262  
18 to 327 months, in other words, 26, 27 years, something like  
19 that. All this illustrates, in the Court's view, is how  
20 totally out of whack the guidelines are with any fair appraisal  
21 of the individual circumstances and the individual role of this  
22 defendant.

23 Of course, the Court is bound by the mandatory  
24 minimums since I find he didn't qualify for the safety valve,  
25 but the dilemma that to some extent the Court confronts is



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1 that, while I strongly feel that Mr. Encarnacion should not be  
2 penalized in any way, shape or form for going to trial -- I  
3 think that is another evil of mandatory minimums and  
4 guidelines -- nevertheless, the Court now has a much fuller  
5 picture of what kind of person Mr. Encarnacion is, and it's not  
6 a particularly pretty picture.

7 Yes, it is true, the Court gives him full credit for  
8 the fact that he has no prior criminal convictions, that he has  
9 worked hard for years at two different jobs, that he has a  
10 supportive family and many other positive qualities that I  
11 don't wish to minimize at all, but I now recognize how willing  
12 a participant he was in each of the crimes of which he now  
13 stands convicted.

14 This was not, as defense counsel at times tries to  
15 argue -- eloquently but in the end unconvincingly to the  
16 Court -- someone who, if not as innocent as he proclaims, at  
17 least was dragged into something of which he was, at best,  
18 peripheral. The Court has no doubt -- and it was proven, in  
19 the Court's view, beyond all doubt -- that he was a very  
20 willing participant in every aspect of the crimes, the serious  
21 crimes, that he engaged in.

22 Nevertheless, I agree with the defense counsel that  
23 the government basically knew all this when they entered into  
24 their arrangement with him, and they felt -- and I think this  
25 is useful to the Court -- they felt that a sentence of 151 to

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1 180-some months, which is what they would have asked for under  
2 the guilty plea arrangement, was sufficient to satisfy the  
3 purposes of Section 3553(a).

4 And while I agree with the government that, if you  
5 will, the vividness of some of the defendant's misconduct was  
6 brought home to everyone, including, I'm sure, the prosecutor  
7 and certainly the Court, by some of the evidence that came out  
8 at trial, and while Mr. Encarnacion's own testimony was, in the  
9 Court's view, blatantly false, nevertheless, the fact that the  
10 sentence that the government believed even at the time, just  
11 shortly before trial, that it entered into the proposal to  
12 allow him to plead to a guideline range of 151 to  
13 180-something, is itself a factor the Court should weigh. It  
14 should weigh in particular because the Court does not wish to  
15 penalize any defendant for going to trial.

16 So, weighing all those things together, though part of  
17 me would impose a much heavier sentence, I'm going to impose a  
18 sentence of 180 months. Specifically, the sentence of the  
19 Court is that the defendant is sentenced to 180 months on  
20 Counts Two, Four and Six, to run concurrently with each other;  
21 he is sentenced to an additional 60 months on Count Three, to  
22 run concurrently with the other counts; so that the total term  
23 of imprisonment is 180 months.

24 He will be sentenced on all counts to three years of  
25 supervised release, on terms that I will get to in a moment.

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1           No fine will be imposed because the Court makes the  
2 finding that this defendant is not in a position to pay any  
3 meaningful fine now or in the foreseeable future.

4           There is, however, a \$500 mandatory special assessment  
5 that must be paid.

6           The terms of supervised release are: First, the  
7 mandatory conditions that the defendant shall not commit any  
8 other federal, state or local crime; that the defendant shall  
9 not illegally possess a controlled substance; that the  
10 defendant shall not possess a firearm or a destructive device;  
11 that the defendant shall refrain from any unlawful use of a  
12 controlled substance and submit within 15 days of his placement  
13 on supervised release to one drug test, to be followed by two  
14 further drug tests, as directed by the probation officer; and  
15 that the defendant shall cooperate in the collection of DNA.

16           There will also be imposed the standard conditions of  
17 supervision 1 through 13. They appear on the face of the  
18 judgment and will be gone over with the defendant by the  
19 probation officer when the defendant begins his period of  
20 supervised release.

21           Finally, there are the special conditions: First, the  
22 defendant shall obey the immigration laws and comply with the  
23 directives of the immigration authorities; and, second, that  
24 the defendant within 72 hours of his release from prison will  
25 report to the nearest probation office to begin his period of

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1 supervised release; and he will be supervised by the district  
2 of his residence.

3 Now, before I advise the defendant of his right of  
4 appeal, is there anything else either counsel wishes to raise  
5 with the Court?

6 MR. BOVE: Judge, with respect to supervised release,  
7 because the defendant was convicted of an object with respect  
8 to Count Two under 841(b)(1)(A), I believe the mandatory  
9 minimum term, even though that's is academic given the  
10 immigration consequences of the conviction, is five years.

11 THE COURT: Let me take a look. Hold on.

12 (Pause)

13 THE COURT: Yes, you're right. So I amend what I just  
14 said: So it will be five years of supervised release under the  
15 same terms and conditions previously mentioned, though, as you  
16 point out, given the immigration consequences, it's probably as  
17 a practical matter moot, but nevertheless it will be five  
18 years.

19 MR. BOVE: Thank you, Judge. Nothing else.

20 THE DEPUTY CLERK: Judge, I think you skipped saying  
21 Count One.

22 THE COURT: Oh, no, no, no --

23 MR. BOVE: I think subsequently there was a mention of  
24 all counts, Judge, which I took to --

25 THE COURT: So everything I said about Count Two also

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1 applies to Count One.

2 Anything from the defense?

3 MS. TODD: No, your Honor.

4 THE COURT: So, Mr. Encarnacion, you have the right to  
5 appeal this sentence. Do you understand that? You have to  
6 speak.

7 THE DEFENDANT: Yes.

8 THE COURT: And if you can't afford counsel for the  
9 appeal, the Court will appoint one for you free of charge. Do  
10 you understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: All right, very good.

13 MR. BOVE: Your Honor, before we conclude, the  
14 government moves to dismiss all underlying counts and  
15 indictments.

16 THE COURT: Yes, that motion is granted.

17 MS. TODD: Your Honor, one administrative thing: With  
18 the Court's authorization, I'd like to request a copy of the  
19 sentencing minutes.

20 THE COURT: Yes, of course.

21 MS. TODD: Thank you.

22 (Adjourned)